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CORE OPTICAL TECHNOLOGIES LLC

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

# CORE OPTICAL TECHNOLOGIES, LLC.

## Plaintiff and Counterclaim-Defendant.

V.

FUJITSU NETWORK  
COMMUNICATIONS, INC.

## Defendant and Counterclaimant.

Case No.: 8:16-CV-00437 AG (JPRx)

**CORE OPTICAL TECHNOLOGIES,  
LLC'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT OF  
ITS MOTION TO DISMISS  
DEFENDANT'S AMENDED  
COUNTERCLAIMS**

Date: July 11, 2016

Date: July 11, 2013  
Time: 10:00 a.m.

Location: Courtroom 10D

Hon. Andrew J. Guilford

1      **I.      Introduction**

2           Plaintiff Core Optical Technologies ("Core Optical") hereby moves, pursuant  
 3 to Federal Rules of Civil Procedure 12(b)(1) & 12(b)(6), to dismiss the Amended  
 4 Counterclaims filed by Fujitsu Network Communications, Inc. ("Defendant").

5           Defendant's amended counterclaims seek declaratory judgments of invalidity  
 6 and non-infringement concerning Core Optical's U.S. Patent No. 6,782,211 ("the  
 7 '211 patent"). However, as detailed below, these counterclaims, which lack *any*  
 8 factual support, fail to satisfy the "plausibility" pleading requirement established by  
 9 the U.S. Supreme Court in *Twombly* and *Iqbal*. In addition, this Court lacks subject  
 10 matter jurisdiction over the counterclaims, as they encompass: (1) patent claims not  
 11 asserted by Core Optical; and/or (2) products/activities not accused of infringement  
 12 by Core Optical. This motion should be granted, and both counterclaims dismissed.

13      **II.     Factual Background**

14           On March 7, 2016, Core Optical filed its Complaint against Fujitsu for  
 15 infringement of the '211 patent. The pioneering technology set forth in the '211  
 16 patent greatly increases data transmission rates in fiber optic networks.

17           Defendant filed its Answer and Counterclaims on May 5, 2016 (after being  
 18 granted a 30-day extension of time). The initial First and Second Counterclaims  
 19 sought declaratory judgments of invalidity and non-infringement, respectively.  
 20 However, Defendant's vague and ambiguous allegations contained absolutely no  
 21 factual support – in clear violation of Federal Rule of Civil Procedure 8(a) – as  
 22 interpreted both before and after *Twombly/Iqbal*. The counterclaims also exceeded  
 23 this Court's subject matter jurisdiction by requesting judicial intervention where no  
 24 actual case or controversy existed.

25           For example, Defendant's original invalidity counterclaim alleged that all  
 26 claims of the '211 patent were invalid (not just those claims asserted by Core  
 27 Optical), and failed to set forth any specific grounds for this blanket assertion.  
 28 Indeed, Defendant only stated that its generic assertion of patent invalidity was

1 premised on a litany of statutes, all pled in the alternative (*i.e.*, "[a]ll claims of the  
 2 '211 patent are invalid for failure to comply with the provisions of Title 35 of the  
 3 United States Code, including without limitation, 35 U.S.C. §§102, 103, and/or  
 4 112"). (Dkt. 18, p. 3, ¶9). That is not enough. *See, e.g., Quarbon.com, Inc. v.*  
 5 *eHelp Corp.*, 315 F. Supp.2d 1046, 1050-51 (N.D. Cal. 2004)(dismissing a similar  
 6 counterclaim as "radically insufficient"); *Wordtech Systems, Inc. v. Integrated*  
 7 *Networks Solutions, Inc.*, 609 F.3d 1308, 1322 (Fed. Cir. 2010)(noting a similar  
 8 allegation provides "little notice"); *Sliding Door Co. v. KLS Doors, LLC*, 2013 WL  
 9 2090298 at \*4 (C.D. Cal., May 1, 2013)(dismissing a similar counterclaim, and  
 10 rejecting the argument that *Twombly/Iqbal* are inapplicable to invalidity claims).<sup>1</sup>

11 Defendant's initial non-infringement counterclaim was similarly evasive, as it  
 12 also lacked even a single, specific fact in support of its conclusory thesis (*i.e.*,  
 13 "Fujitsu is not infringing and has not infringed, directly or indirectly, any valid  
 14 claim of the '211 patent either literally or under the doctrine of equivalents").  
 15 (Dkt. 18, ¶13). Further, it expansively sought an essentially boundless judicial  
 16 determination that all Fujitsu products and activities (not just those accused by Core  
 17 Optical) did not infringe any valid claim of the '211 patent, not just those claims  
 18 asserted by Core Optical in this action.

19 Consistent with this developing theme, Defendant also failed to provide Core  
 20 Optical with fair notice of several affirmative defenses. Most notably, Defendant's  
 21 Fourth Affirmative Defense improperly attempted to assert at least four separate and

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 23 <sup>1</sup> *See also, Sorenson v. Spectrum Brands, Inc.*, 2009 WL 5199461 at \*1 (S.D. Cal.,  
 24 December 23, 2009)(dismissing a similar counterclaim as a "threadbare statement"  
 25 that is "precisely the type of allegation that is insufficient to state a claim under the  
*Iqbal standard*"); *Xilinx, Inc. v. Invention Investment Fund I LP*, 2011 WL 3206686  
 26 at \*6 (N.D. Cal., July 27, 2011)(dismissing a similar counterclaim, and rejecting the  
 27 position that local patent rules can allow invalidity counterclaims premised on  
 28 "wholly conclusory allegations"); *PageMelding, Inc. v. ESPN, Inc.*, 2012 WL  
 3877686 at \*3 (N.D. Cal., September 6, 2012)(stating that such a counterclaim is  
 equivalent to a general allegation that the patent is defective, nothing more).

1 distinct legal doctrines (again in the alternative) in a single sentence (*i.e.*, "[u]pon  
 2 information and belief, Core [Optical]'s claims are barred, in whole or in part, under  
 3 the doctrine(s) of laches, equitable estoppel, acquiescence, and/or ratification").  
 4 (Dkt. 17, ¶22). Again, Defendant's allegations were plainly insufficient. *See, e.g.*,  
 5 *Quarbon.com*, 315 F. Supp.2d at 1049-50 (striking similar estoppel defense); *Polara*  
 6 *Engineering, Inc. v. Campbell Co.*, Case No. SACV 13-0007 CJC, Dkt. 16, pp. 3-4  
 7 (C.D. Cal. April 25, 2013)(striking laches, acquiescence, and other defenses in a  
 8 patent infringement action, even under a pre-*Twombly* fair notice standard, where  
 9 they were essentially mere restatements of legal doctrines and/or principles with no  
 10 explanation provided).

11 Core Optical timely requested (and conducted) a Local Rule 7-3 pre-filing  
 12 conference with Fujitsu to discuss these deficiently pled counterclaims and defenses.  
 13 As a result, Defendant filed several amendments on May 26, 2016. Of particular  
 14 significance, Defendants abandoned their previously asserted affirmative defenses  
 15 of equitable estoppel, acquiescence, and ratification without any explanation – a  
 16 telling response given that Defendant had almost two months to prepare its Answer.

17 Defendant also amended its invalidity and non-infringement counterclaims.  
 18 With respect to the former, Defendant has merely added language (copied directly  
 19 from several of the cited statutes) in a transparent attempt, not to provide Core  
 20 Optical with any useful information or to limit the scope of its counterclaim to  
 21 allegations for which Defendant truly believes it has actual support, but to give the  
 22 illusion of a substantive modification. Defendant also dropped its prior reference to  
 23 all grounds for invalidity beyond those specifically identified in this Court's  
 24 Standing Patent Rule 2.5.<sup>2</sup>

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25           <sup>2</sup> Defendant's Amended First Counterclaim now states, in pertinent part, that it  
 26 seeks "to obtain a declaratory judgment that each and every claim of the '211 patent  
 27 is invalid..." and that "[o]ne or more claims of the '211 patent are invalid under 35  
 28 U.S.C. §102 as anticipated in view of the prior art...[o]ne or more claims of the  
 '211 patent are invalid under 35 U.S.C. §103 as obvious in view of the prior

1       **III. Defendant's First Amended Counterclaim (Invalidity)**

2              Defendant's invalidity counterclaim, even after amendment, still fails to  
 3 satisfy Federal Rule of Civil Procedure 8(a) and the "plausibility" pleading standard  
 4 set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v.*  
 5 *Iqbal*, 556 U.S. 662, 678 (2009).<sup>3</sup> In particular, it remains devoid of any supporting  
 6 facts.<sup>4</sup> Nor does it provide Core Optical with any notice as to which claims of the  
 7 '211 patent are purportedly invalid under each of the five cited statutory provisions.  
 8 It should therefore be dismissed pursuant to Federal Rule of Civil Procedure  
 9 12(b)(6). Defendant's Amended First Counterclaim also fails to trigger subject  
 10 matter jurisdiction, and should therefore be dismissed pursuant to Federal Rule of  
 11 Civil Procedure 12(b)(1), as it continues to seek a declaration of invalidity covering  
 12 all claims of the '211 patent, not just those asserted by Core Optical. *See, e.g.,*

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13              art...[o]ne or more claims of the '211 patent are invalid under 35 U.S.C. §112, ¶1  
 14 for failing to contain an adequate written description of the claimed invention....  
 15 [o]ne or more claims of the '211 patent are invalid under 35 U.S.C. §112, ¶1 for  
 16 failing to enable a person of ordinary skill in the art to make and use the invention  
 17 therein....[and] [o]ne or more claims of the '211 patent are invalid under 35 U.S.C.  
 18 §112, ¶2 for failing to particularly point out and distinctively claim he subject  
 19 matter which the applicant regarded [as] his invention." (Dkt. 26, ¶¶1 & 9-13).

20              <sup>3</sup> Core Optical acknowledges that some courts have declined to apply *Twombly* and  
 21 *Iqbal* to patent invalidity and non-infringement counterclaims. *See, e.g., Microsoft*  
*Corp. v. Phoenix Solutions, Inc.*, 741 F. Supp.2d 1156, 1163 (C.D. Cal. 2010).  
 22 However, these cases are easily distinguished – as they have often relied on a  
 23 perceived unfairness to patent defendants given the lower pleading standard for  
 24 direct infringement under Form 18 (a pleading form that has now been abolished).

25              <sup>4</sup> Several cases have also declined to apply *Twombly/Iqbal* due to the existence of  
 26 local patent rules that require service of invalidity contentions. But, Defendant's  
 27 counterclaim (as pled) still exceeds the scope of Special Patent Rule 5.4 (which is  
 28 limited to claims asserted by Core Optical). Moreover, Core Optical will not  
 receive Defendant's contentions for almost five more weeks, depriving it of the  
 ability to file a knowing/intelligent Answer and to conduct targeted fact discovery.  
 Courts have also expressly held that that local patent rules cannot abrogate national  
 pleading standards established by the U.S. Supreme Court. *See, e.g., Tyco Fire*  
*Products LP v. Victaulic Co.*, 777 F. Supp.2d 893, 904 (E.D. Pa. 2011).

1       *Sloan Valve Co. v. Zurn Industries, Inc.*, 712 F. Supp.2d 743, 750-753 (N.D. Ill.  
 2 2010)(counterclaimant failed to demonstrate a justiciable controversy with respect  
 3 to a declaratory judgment action requesting invalidation of non-asserted claims).

4       Nevertheless, Core Optical is cognizant of the fact that Fujitsu's repeated  
 5 filing of defective pleadings, along with the lead-time required before a regularly  
 6 noticed motion is heard by this Court, has effectively rendered any attempt to strike  
 7 Defendant's invalidity counterclaim effectively moot – as Defendant must serve its  
 8 Special Patent Rule 5.4 invalidity contentions by July 11, 2016 (the first hearing date  
 9 available to Core Optical). Core Optical therefore will agree to withdraw the portion  
 10 of the present motion relating to Defendant's invalidity counterclaim, when and if  
 11 Defendant's recent concession (contained in an e-mail sent on June 7, 2016, just two  
 12 days before the deadline for filing the present motion) is formalized in the written  
 13 record (via an amended counterclaim), namely, that Fujitsu "will agree" to limit its  
 14 invalidity counterclaim by not raising "an invalidity challenge with respect to claims  
 15 [of the '211 patent] that Core does not assert in this action." (LaPorte Decl., Ex. 2).

16 **IV. Defendant's Second Amended Counterclaim (Non-Infringement)**

17       Defendant's May 26, 2016 amendments to its non-infringement counterclaim  
 18 were again designed to provide only the illusion of substantive modification. For  
 19 example, Defendant's largest change is the addition of a meaningless paragraph that  
 20 merely attempts to recount what Core Optical allegedly pled in its Complaint (*i.e.*,  
 21 "Core has alleged..."). (Dkt. 26, ¶17). The only other modification of note is the  
 22 addition of a vague and ambiguous clause (starting with the word "because") to the  
 23 end of Defendant's original, generalized allegation of non-infringement (*i.e.*, "Fujitsu  
 24 has not directly or indirectly infringed any valid claim of the '211 patent, either  
 25 literally or under the doctrine of equivalents") that now references a limited number  
 26 of products and patent claims.<sup>5</sup> (Dkt. 26, ¶19). Indeed, given the ambiguity of this

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27       <sup>5</sup> Defendant's Amended Second Counterclaim now states, in pertinent part, that  
 28 "Upon information and belief, Fujitsu has not directly or indirectly infringed any

1 clause in this context, Core Optical is left to guess whether Defendant has limited its  
 2 allegations of non-infringement to those products and patent claims that it has now  
 3 specifically identified, or whether those products and patent claims are intended to  
 4 be non-limiting examples.<sup>6</sup>

5 Regardless of which interpretation is correct, Defendant's Amended Second  
 6 Counterclaim should still be dismissed, pursuant to Federal Rule of Civil Procedure  
 7 12(b)(6), because it fails to provide Core Optical with any factual support for  
 8 Defendant's allegations of non-infringement. Indeed, Defendant fails to provide  
 9 even a single ground for non-infringement, let alone any factual support.<sup>7</sup> See, e.g.,  
 10 *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678-79 (threadbare recitals of the  
 11 elements of a cause of action, supported by mere conclusory statements, do not  
 12 suffice); *Infineon Technologies AG v. Volterra Semiconductor Corp.*, 2013 U.S.  
 13 Dist. LEXIS 17501 at \*3-4 (N.D. Cal., February 7, 2013)(dismissing a non-  
 14 infringement counterclaim for failing to provide factual support, and stating that the  
 15 counterclaimant, as the party who bears the burden of proof, must set forth the  
 16 parameters of its claim); *PageMelding*, 2012 WL 3877686 at \*3 (dismissing a non-  
 17 infringement counterclaim for failing to plead factual support, and stating that the  
 18 counterclaimant must adequately plead its claim regardless of the level of specificity

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19 valid claim of the '211 patent, either literally or under the doctrine of equivalents  
 20 because none of the 100G Transponder, 100G Muxponder, 40G Transponder  
 21 (coherent), FLASHWAVE 9500 Packet Optical Networking Platform, and modules  
 22 that include Fujitsu's 40G or 100G dual polarization coherent optical receivers,  
 practices claim 15, 30, 33, 35 and 37 of the '211 patent." (Dkt. 26, ¶19).

23 <sup>6</sup> In actuality, no ambiguity exists, at least with respect to the patent claims.  
 24 Defendant is still improperly asserting non-infringement of "each and every claim  
 25 of the '211 patent" with no factual support. (Dkt. 26, ¶1).

26 <sup>7</sup> Defendant does not even plead any of the referenced "information" on which it  
 27 purports to base its counterclaim. Given that Defendant (unlike Core Optical) has  
 28 full access to all relevant documents and that the parties had already "met and  
 conferred" (on at least two occasions) to discuss the deficiencies in Defendant's  
 pleadings, the absence of factual support suggests that none exists.

1 provided by the plaintiff in its Complaint); *Xilinx*, 2011 WL 3206686 at \*6  
 2 (dismissing a non-infringement counterclaim for failing to plead factual support, and  
 3 stating that the target of such a counterclaim cannot mount a meaningful defense in  
 4 the face of such bare allegations).

5 The lack of adequate pleading (and thus the need for dismissal) is particularly  
 6 apparent here, as: (1) Defendant has not limited its non-infringement allegations to  
 7 the claims of the '211 patent being asserted by Core Optical; (2) Defendant has not  
 8 expressly limited its allegations of non-infringement to those products being  
 9 accused by Core Optical; (3) Defendant is seeking a broad declaratory judgment of  
 10 non-infringement with respect to direct *and* indirect infringement, both literally *and*  
 11 under the doctrine of equivalents; (4) Form 18 has been abolished, there is no  
 12 inherent unfairness in applying *Twombly/Iqbal*; (5) the Standing Patent Rules of this  
 13 Court (unlike the local patent rules of many other jurisdictions) do not mandate the  
 14 disclosure of non-infringement contentions; and (6) Defendant has voluntarily  
 15 chosen to file a counterclaim (and not simply assert an affirmative defense), to  
 16 which Core Optical must be provided an opportunity to file a knowing/intelligent  
 17 Answer.<sup>8</sup> In particular, given the lack of a local patent rule requiring Defendant to  
 18 disclose its non-infringement contentions, Core Optical should not have to wait  
 19 upwards of six months until it is permitted to serve written discovery, it receives  
 20 Defendant's responses, and it is potentially required to file a lengthy motion to  
 21 compel before it is provided *any* factual information as to the bases (if any) for

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22  
 23 <sup>8</sup> See, e.g., Northern District of Georgia Local Patent Rule 4.2, Northern District of  
 24 Illinois Local Patent Rule 2.3, Eastern District of Missouri Local Patent Rule 3-3,  
 25 Eastern District of North Carolina Local Patent Rule 303.3, Middle District of  
 26 North Carolina Local Patent Rule 103.3, District of New Jersey Local Patent Rule  
 27 3.2A, Nevada Local Patent Rule 16.1-8, Northern District of New York Local  
 28 Patent Rule 3.3, Northern District of Ohio Local Patent Rule 3.3, Western District  
 of Pennsylvania Local Patent Rule 3.4, Western District of Tennessee Local Patent  
 Rule 3.3, District of Utah Local Patent Rule 2.4, Eastern District of Washington  
 Local Patent Rule 121, Western District of Washington Local Patent Rule 121.

Defendant's extremely broad *counterclaim* (not just an affirmative defense) – a counterclaim for which Defendant *bears the burden of pleading and proof*.

Defendant's Amended Second Counterclaim should also be dismissed, pursuant to Federal Rule of Civil Procedure 12(b)(1), to the extent it exceeds this Court's subject matter jurisdiction. In particular, if Defendant is still generically asserting that *all* of its products and activities (even those not accused by Core Optical) do not infringe *any* valid claim of the '211 patent (even those not asserted by Core Optical), Defendant is improperly attempting to extend its counterclaim beyond the currently existing case or controversy. *See, e.g., PPS Data, LLC v. Allscripts Healthcare Solutions, Inc.*, 2012 U.S. Dist. LEXIS 8367 at \*11-12 (M.D. Fla, January 25, 2012)(stating courts cannot give Defendants a judicial imprimatur that all of their products, services, and conduct are "ok")

Finally, if Defendant conversely asserts that its counterclaim is now limited to only those products and claims it has specifically identified (*i.e.*, a subset of those products and claims cited in Core Optical's Complaint), it should be stricken and/or dismissed as duplicative of Core Optical's claim of infringement. *See, e.g., Sliding Door*, 2013 WL 2090298 at \*3-4 (dismissing counterclaim seeking a declaratory judgment of non-infringement because it presented an issue that was already before the Court in the Complaint, and therefore did not serve any useful purpose).

## V. Conclusion

For the reasons stated above, Core Optical's Motion to Dismiss Defendant's Amended Counterclaims should be GRANTED in its entirety

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